The Commonwealth of Massachusetts
Department of the State Treasurer
Alcoholic Beverages Control Commission
Boston, Massachusetts 02114

Steven Grossman
Treasurer and Receiver General

Kim S. Gainsboro, Esq.
Chairman

NOTICE OF SUSPENSION

May 13, 2013

MONKEY BUSINESS, INC. D/B/A THE MONKEY BAR AND GRILL
63-67 NORTH PLEASANT STREET
AMHERST, MA 01002
LICENSE#: 002400082
VIOLATION DATE: 2/21/2013
HEARD: 04/23/2013

After a hearing on April 23, 2013 the Commission finds Monkey Business, Inc. d/b/a The Monkey Bar and Grill in violation of:

1) 204 CMR 2.05 (2)- Permitting an illegality on the licensed premises, to wit: M.G.L. c. 138, § 34C- Possession of an alcoholic beverage by a person under twenty-one years of age (1 Count);
2) 204 CMR 4.03 (1)(c) No licensee or employee or agent of a licensee shall sell, offer to sell or deliver to any person or group of persons any drink at a price less than the price regularly charged for such drinks during the same calendar week, except at private functions not open to the public (1 Count); and
3) 204 CMR 2.16 (1) Failure to post cover charge outside of licensed premises and failure to give patrons a numbered printed receipt. (1 Count).

The Commission **suspends the licensee's license for a total of sixty (60) days to be served. The suspension shall commence on Sunday, September 1, 2013, and terminate on Wednesday, October 30, 2013.** The license will be delivered to the Local Licensing Board or its designee on Sunday, September 1, 2013 at 9:00 a.m. It will be returned to the licensee Thursday, October 31, 2013. **No fine in lien of suspension will be accepted for thirty (30) of these days.**

You are advised that pursuant to the provisions of M.G.L. c.138 §23, you may petition the Commission to accept an offer in compromise in lieu of suspension for the remaining thirty (30) days within twenty (20) calendar days following such notice of such suspension. If accepted, you may pay a fine using the enclosed form. All checks must be certified and accompanied by the enclosed form, which must be signed by a Massachusetts Licensed Accountant.

You are advised that you have the right to appeal this decision under M.G.L. c. 30A to Superior Court within thirty (30) days upon receipt of this notice.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro
Chairman

cc: Local Licensing Board
Frederiek G. Mahony, Chief Investigator
J. Mark Dickison, Esq. via Facsimile 617-439-3987
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DECISION

MONKEY BUSINESS, INC. D/B/A THE MONKEY BAR AND GRILL
63-67 NORTH PLEASANT STREET
AMHERST, MA 01002
LICENSE#: 002400082
VIOLATION DATE: 2/21/2013
HEARD: 04/23/2013

Monkey Business, Inc. d/b/a The Monkey Bar and Grill (the "Licensee") holds an alcohol license issued pursuant to M.G.L. c. 138, § 12. The Alcoholic Beverages Control Commission (the "Commission") held a hearing on Tuesday, April 23, 2013, regarding alleged violations of:

1. 204 CMR 2.05 (2)- Permitting an illegality on the licensed premises, to wit: M.G.L. c. 138, § 34C- Possession of an alcoholic beverage by a person under twenty-one years of age (1 Count);
2. 204 CMR 4.03 (1)(c) No licensee or employee or agent of a licensee shall sell, offer to sell or deliver to any person or group of persons any drink at a price less than the price regularly charged for such drinks during the same calendar week, except at private functions not open to the public (1 Count); and
3. 204 CMR 2.16 (1) Failure to post cover charge outside of licensed premises and failure to give patrons a numbered printed receipt. (1 Count).

Prior to the commencement of the hearing, the licensee stipulated to two of the three violations alleged in Investigator Velez's Report. Specifically, the Licensee stipulated to violating 204 CMR 4.03 (1)(c) No licensee or employee or agent of a licensee shall sell, offer to sell or deliver to any person or group of persons any drink at a price less than the price regularly charged for such drinks during the same calendar week, except at private functions not open to the public (1 Count); and 204 CMR 2.16 (1) Failure to post cover charge outside of licensed premises and failure to give patrons a numbered printed receipt. (1 Count).

The following documents are in evidence:

<u>Exhibits of Investigator:</u>

1. Investigator Velez's Violation Report dated February 21, 2013;
2. RMV Printout of Melissa Geldart;
3. Poster of Bud Light beer Special Sale $7.00/Pitcher, $1.00/Draft until 11:30 p.m.;
4. Massachusetts Driver's License for Mary Gillespie; and
5. Licensee's Partial Stipulation of Facts to Only Two of the Three Charges: 204 CMR 4.03 (1) and 204 CMR 2.16 (1) only.

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Exhibits of Licensee:

A. Biography of Mauro Aniello (4 pages);
B. Eight (8) Photographs of Licensed Premises;
C. Menu of Establishment (17 pages);
D. Two (2) Letters of Character Reference for Mauro Aniello and Claire Aniello;
E. Payment Receipt for Licensee's Purchase of Advanced ID Detection (ID Verification Service);
F. Certificates for Completion of Safe ID Check Program conducted by J.B.S. Professional Services along with eTIPS training cards;
G. Receipt Description Example for Licensee's Future Practice; and
H. Licensee's Weekly Receipts from February 18 to February 23, 2013.

The Commission took administrative notice of the Licensee's entire license file.
There is one (1) audio recording of this hearing.

FACTS

1. On Thursday, February 21, 2013, at approximately 11:15 p. m., Investigators Guarino, Kujawski, and Velez, along with Amherst Police officers, investigated the business operations of Monkey Business, Inc. d/b/a The Monkey Bar and Grill, to determine the manner in which their business was being conducted. (Ex. 1, Testimony)
2. Investigators observed the doorman collecting a $3.00 cover charge near the front entrance of the licensed premises. (Ex. 1, Testimony)
3. Investigators observed that several individuals paid a cover charge, that is, they provided money to gain access into the licensed premises, and that these individuals were not provided with a printed receipt. Investigators did not observe any sign outside the licensed premises stating the cover charge. (Ex. 1, Testimony)
4. Investigators also observed a sign in the window which advertised, "Bud Light special $1.00 draft until 11:30 p.m." (Ex. 1, Testimony)
5. Investigators and Amherst Police officers entered the licensed premises. (Ex. 1, Testimony)
6. The attention of investigators was drawn to a youthful looking individual, standing near the bar, in possession of what appeared to be an alcoholic beverage. (Ex. 1, Testimony)
7. Investigators identified themselves and asked to see proof of legal drinking age. (Ex. 1, Testimony)
8. The female individual was identified as Melissa Geldart, actual date of birth [redacted] age twenty.
9. Ms. Geldart presented investigators with an unexpired Massachusetts driver's license in the name of Mary Gillespie, date of birth [redacted] age twenty-one. (Ex. 1, Testimony)
10. Ms. Geldart and Ms. Gillespie look nothing alike. Ms. Geldart has a different hair color, a different shaped nose and chin, and a slimmer face. (Exs. 2, 4, Testimony)
11. Investigators observed Ms. Geldart in possession of a Bud Light draft beer. (Ex. 1, Testimony)
12. Ms. Geldart stated that she presented the identification to the doorman upon entry into the licensed premises. (Ex. 1, Testimony)
13. Investigators spoke to the owner, Mauro Aniello, about the Bud Light special advertisement that they had observed in the window. (Ex. 1, Testimony)
14. Mr. Aniello stated to investigators that you get $1.00 (one) dollar draft beer until 11:30 p.m., 1 per person. (Ex. 1, Testimony)
15. Investigators informed Mr. Aniello of the violations, and that a violation report would be submitted to the Chief Investigator for further review. (Ex. 1, Testimony)

DISCUSSION

Violation of 204 CMR 2.05 (2) Permitting an illegality on the licensed premises, to wit: Ch. 138, § 34C:

M.G.L. c. 138 gives the Commission the authority to grant, revoke and suspend licenses. Chapter 138 was "enacted ..... to serve the public need and... to protect the common good." M.G.L. c. 138, § 23, as amended through St. 1977, c. 929, § 7. "[T]he purpose of discipline is not retribution but the protection of the public." Arthurs v. Board of Registration in Medicine, 383 Mass. 299, 317 (1981). The Commission is given "comprehensive powers of supervision over licensees," Connolly v. Alcoholic Beverages Control Comm., 334 Mass. 613, 617 (1956), as well as broad authority to issue regulations. New Palm Gardens, Inc. v. Alcoholic Beverages Control Commission, 11 Mass. App. Ct. 785, 788 (1981).

The law is well-settled that 'under the regulation, [204 C.M.R 2.05(2)] the responsibility of the licensee is to exercise sufficiently close supervision so that there is compliance with the law on the premises. A vendor who sells alcohol is "bound at his own peril to keep within the condition of his license." Commonwealth v. Gould, 158 Mass. 499, 507 (1893). Burlington Package Liquors, Inc. v. Alcoholic Beverages Control Commission, 7 Mass. App. Ct. 186, 190 (1979). It is, thus, quite possible for a licensee to offend the regulatory scheme without scienter. Rico's of the Berkshires, Inc., v. ABCC, 19 Mass. App. Ct. 1026, 1027 (1985) (rescript).

The licensee is responsible for illegalities, disturbances, and/or disorders that occur on the licensed premises. The licensee has a duty of care to prevent foreseeable harm to its patrons and others. See Tobin, Id.; Westerback v. Harold F. Leclair Co., 50 Mass App. Ct. 144 (2000); Kane v. Fields Corner Grille, Inc. 341 Mass. 640, 641 (1961); Carey v. New Yorker of Worcester, Inc. 355 Mass. 450, 451 (1969). It is unlawful for an individual under twenty-one years of age and not accompanied by a parent or legal guardian to knowingly possess... alcoholic beverages. M.G.L. c. 138, § 34C. In determining whether evidence exists to prove a violation, the Commission functions as the finder of facts and determines the credibility and weight to be given the evidence before it. See Guarino v. Director of the Div. of Employment Sec., 393 Mass. 89, 92 (1984), and cases therein cited. In this case, the evidence shows that Melissa Geldart, age twenty, was in possession of an alcoholic beverage, a Bud Light draft beer, while inside the Licensee's licensed premises.

General Laws chapter 138, § 34B provides, in pertinent part, that "[a]ny licensee, or agent or employee thereof, under this chapter, who reasonably relies on such a liquor purchase identification card, or an identification card issued under section 8E of chapter 90, or motor vehicle license issued pursuant to said section eight, for proof of a person's identity and age shall be presumed to have exercised due care in making such ***delivery or sale*** [emphasis supplied] of alcohol or alcoholic beverages to a person under twenty-one years of age. Such presumption shall be rebuttable." By its plain language, without the need for construction or interpretation, the relief from liability available to a licensee under § 34B is limited to the accusation that the licensee delivered or sold alcoholic beverages to a person under the age of twenty-one. The long-established rules of statutory construction require that the Commission cannot, and will not, read words into this statute. Commonwealth v. Palmer, (Supreme Judicial Court Docket No. SJC 11225, Slip Opinion dated April 5, 2013)("Our rules of statutory construction counsel that when the meaning of a word used in a statute is clear, we should interpret it in accordance with that meaning, without more. [Footnote omitted] See G.L. c. 4, § 6 ("Words and phrases shall be construed according to the common and approved usage of the language"); Commonwealth v. Poissant, 443 Mass. 558, 563 (2005), quoting Civitarese v. Middleborough, 412 Mass. 695, 700 (1992) ("We will not read into the plain words of a statute a legislative intent that is not expressed by those words"). Compare Commonwealth v. Rahim, 441 Mass. 273, 277-278 (2004) (adhering to plain language where meaning of statute was clear),

with, e.g., Commonwealth v. Scott, ante at 355, 358 (2013) (where meaning of statutory term is ambiguous, appropriate to look at language of statute as whole), and Commonwealth v. Hamilton, 459 Mass. 422, 431-433 (2011), citing 81 Spooner Rd. LLC v. Brookline, 452 Mass. 109, 115 (2008) ("where statutory language is ambiguous, appropriate to look to legislative history).") Since §34B refers only to the activities of delivery and sale, and omits any reference to the act of possession, this statute offers no relief from liability for allowing possession of alcoholic beverages in violation of M.G.L. c. 138, § 34B.

Even assuming *arguendo* that the protection under § 34B might be available in this matter (which it is not for the charge of permitting the illegality of an under-aged person possessing alcoholic beverages on the licensed premises), M.G.L. c. 138, § 34B offers protection from license revocation or criminal penalties to license holders who *reasonably* rely on one (1) of several pieces of identification specified in the statute, including a valid Massachusetts driver's license. (emphasis supplied). See Murray's Liquors, Inc. v. Alcoholic Beverages Control Commission, 48 Mass.App.Ct. 100 (1999); In Re: Alan C. Dinh dba Juliano's Beer & Wine, Quincy (ABCC Decision April 8, 2005).

In this case, a youthful looking female later identified as Melissa Geldart, age twenty, was in possession of a Bud Light draft beer. Ms. Geldart presented investigators with an unexpired Massachusetts driver's license, in the name of Mary Gillespie, date of birth May 5, 1991, age twenty-one. Monkey Business argues that it reasonably relied upon the Massachusetts' license which Ms. Geldart presented to the doorman. The Commission has previously held that a licensee must check the identification on the day of service for reliance on one of the statutorily specified pieces of identification to be reasonable. Howard Johnson Company v. ABCC, 24 Mass. App. Ct 487 (1987).

There was no evidence that the licensee asked for, or checked, for proof of age at the time of service or delivery of any alcoholic beverages. In this case, the evidence presented showed that the only identification check was made at the entrance to the licensed premises, where no alcoholic beverages were sold or delivered. Moreover, the Investigators presented persuasive and credible evidence to show that the Licensee's reliance on the Massachusetts' license produced by Ms. Geldart as proof of her age and identity was not reasonable.

Ms. Geldart and Ms. Gillespie look nothing alike. The individuals have different facial structures and features, different hair color, chin shape, and nose shape. Therefore, the Commission is persuaded, and finds after reviewing the exhibits, that differences between the two individuals were apparent. The Commission finds that a reasonable person would be able to discern those differences and know that the photograph on the license did not depict the individual presenting it as proof of her age. Thus, even if the protection under § 34B were available to this Licensee for this charge, which it is not, the Licensee did not reasonably rely on the identification presented.

Violation of 204 CMR 4.03 (1)(c):

By regulation, the Commission has prohibited a series of practices by Section 12 licensees, such as this Licensee. "No licensee or employee or agent of a licensee shall sell, offer to sell or deliver to any person or group of persons any drink at a price less than the price regularly charged for such drinks during the same calendar week, except at private functions not open to the public." 204 CMR 4.03 (1)(c). In this matter, the Licensee advertised, and in fact did sell or deliver to persons a drink at a price less than the price regularly charged for such drinks during the same calendar week. The Licensee admitted to this violation.

The Commission notes that the Licensee's misconduct occurred three weeks after the Commission filed its legislatively mandated study on whether this regulation should be changed. Following a series of five public hearings to receive comments, including a hearing held in Northampton, the comments submitted

to the Commission urged no change to this regulation. The Commission reported this to the Legislature. The regulation remained unchanged.

Violation of 204 CMR 2.16 (1):

By regulation 204 CMR 2.16, the Commission establishes standards of performance for licensees who wish to collect admission fees or admission charges from patrons. 204 CMR 2.16. Among these standards are those set by statute in M.G.L. c. 140, § 183D. Both this regulation and this statute require the conspicuous posting of a sign announcing the cover charge. The Commission also by regulation requires the licensee to give a serially numbered receipt thereby creating a "paper trail" of revenue collected, frequently in cash, from the admission fees or charges. The Licensee in this matter, did not post the required sign for the cover charge, and did not issue the required receipts to create the paper-trail of revenue. The Licensee admitted to this violation.

CONCLUSION

Based on the evidence, the Commission finds that the licensee violated:

1) 204 CMR 2.05 (2)- Permitting an illegality on the licensed premises, to wit: Ch. 138, § 34C- Possession of an alcoholic beverage by a person under twenty-one years of age (1 Count);
2) 204 CMR 4.03 (1)(c)-No licensee or employee or agent of a licensee shall sell, offer to sell or deliver to any person or group of persons any drink at a price less than the price regularly charged for such drinks during the same calendar week, except at private functions not open to the public (1 Count); and
3) 204 CMR 2.16 (1)-Failure to post cover charge outside of licensed premises and failure to give patrons a numbered printed receipt. (1 Count).

SANCTIONS

A. Violation of 204 CMR 2.05 (2)- Permitting an illegality on the licensed premises, to wit: Ch. 138, § 34C:

This Licensee has been in business for more than ten years. However, today's decision involves the 10th underage person found in the Licensee's premises in possession of alcoholic beverages in violation of M.G.L. c. 138, § 34C since 2000. At each hearing before the Commission, the Licensee presented documents and testimony in mitigation indicating that their policies and practices have been overhauled to insure no minors will be served alcoholic beverages in the future. However, this is the 4th time this Licensee has appeared before the Commission since March of 2011 for a violation involving a minor. Furthermore, this Licensee is still on probation from a decision dated January 12, 2012 for a violation involving a minor.

During this occasion, the Licensee, who is located in a college town, offered $1.00 drink specials. The minor looked nothing like the individual depicted in the Massachusetts Driver's License she presented. The Commission questions whether the individual checking the identification at the door, even looked at it. These facts cast doubt on whether this Licensee is taking these violations seriously. Despite the evidence that the Licensee has presented regarding mitigation, based on these continuing violations, it appears to this Commission that this Licensee is not taking steps to insure that minors are not served alcoholic beverages in its premises.

Based on the violations above, the Commission **suspends the license for sixty (60) days, of which twenty-five (25) days will be served, and thirty-five (35) days will be held in abeyance**

for a period of two (2) years provided no further violations of Chapter 138 or Commission Regulations occur. No offer in compromise will be accepted for fifteen (15) of the twenty-five (25) days to be served. An offer in compromise will be considered for ten (10) days of this penalty.

By decision dated January 12, 2012, the Commission ordered a twenty-five (25) day license suspension, with ten (10) days to be served and fifteen (15) days to be held in abeyance for a period of two (2) years, provided no further violations of either Chapter 138 or Commission Regulations occur. Based on the violation found above, the licensee violated the conditions of that fifteen (15) day suspension being held in abeyance. The Commission hereby orders that suspension be served on and after the twenty-five (25) day suspension. The licensee will serve a total of forty (40) days.

No offer in compromise will be considered for thirty (30) of the forty (40) days to be served for this penalty. Furthermore, the suspension will begin on September 1, 2013.

B. Violation of 204 CMR 4.03 (1)(c):
The Commission **suspends the license for ten (10) days to be served from and after the suspension imposed in paragraph A above** for violating 204 CMR 2.05 (2), to wit: M.G.L. c. 138, § 34C. An offer in compromise will be considered for this penalty.

C. Violation of 204 CMR 2.16 (1):
The Commission **suspends the license for ten (10) days to be served from and after the suspension imposed in paragraph B above** for violating 204 CMR 4.03 (1). An offer in compromise will be considered for this penalty.

Based on the penalties imposed above, the Commission suspends the license of the Monkey Bar, Inc. for a total of ninety-five (95) days, with sixty (60) days to be served and thirty-five days to be held in abeyance for a period of two (2) years provided no further violations of Chapter 138 or Commission Regulations occur. The sixty (60) day suspension will begin on September 1, 2013. No offer in compromise will be considered for thirty (30) of the sixty (60) days to be served.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

Kim S. Gainsboro, Chairman _____

Susan Corcoran, Commissioner _____

I, the undersigned, hereby certify that I have reviewed the hearing record and concur with the above decision.

Kathleen McNally, Commissioner _____

DATE: May 13, 2013

You have the right to appeal this decision to the Superior Courts under the provisions of Chapter 30A of the Massachusetts General Laws within thirty (30) days of receipt of this decision.

cc: Local Licensing Board
Frederick G. Mahony, Chief Investigator
Nick Velez, Investigator
Caroline Guarino, Investigator
J. Mark Dickison, Esq. via Facsimile 617-439-3987
Administration
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